IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; and CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES,

Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY and FRED VEGA, individually and on behalf of all others similarly situated, WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Defendants' statement of the case found at pages 4-10 in their Petition is incomplete, inaccurate and misleading in several material respects.

Perhaps the most serious defect in Defendants' statement is the failure to state that the primary ground for the District Court's finding of past illegal discrimination and the District Court's finding that a hiring order was required in the instant case was the almost absolute non-existence of minorities in Defendants' workforce despite the existence of a large minority population in Los Angeles County. The District Court's factual and legal rulings on these points are found at 8 FEP Cases 239, 240-42 (C.D. Cal. 1973).

Defendants' statement at page four of their Petition that no discriminatory hiring occurred after the effective date of Title VII of the Civil Right Act of 1964, as amended, 42 U.S.C. §2000e, et seq. ("Title VII") is misleadning. A more complete and accurate statement is that in early 1973, almost one year after Title VII became applicable to public employers, Defendants were in the process of knowingly violating Title VII by utilizing practices they knew to be violative of Title VII, but ceased utilization of these practices only upon learning that this lawsuit was being commenced (R. 140-41; R.T. 48-49). Further, the District Court specifically found as a fact that Defendants were utilizing illegal written tests "until learning that this lawsuit was about to commence." 8 FEP Cases 240-41.

It also is misleading for Defendants to argue that the District Court found that there was no deliberate or purposeful discrimination. This finding was made by the District Court when it was believed to be "of no moment." The truth of the matter is that purposeful discrimination was proved to the extent that it was admitted by high officials of the Los Angeles County Fire Department (see Section "I.E." infra).

At page five of Defendants' Petition is found a totally inaccurate statement. Here it is stated that the Ninth Circuit ultimately held that the Plaintiffs had no standing to challenge "any hiring practices occurring before 1972." No such holding was made by the Ninth Circuit. The Circuit Court held only that Plaintiffs lacked standing to challenge one particular pre-1972 test, i.e., a written test administered in 1969; all other pre-1972 practices remain subject to challenge. 566 F.2d 1337-38.

Another totally inaccurate statement is found at page six of the Petition. Here it is stated: "The only named plaintiffs in this case were individuals who had applied for and taken only the 1972 written examination. . . ." The Plaintiffs also include minority firemen already on the job. See the Findings of Fact at 8 FEP Cases 240, para. 1.

SUMMARY OF ARGUMENT

The reasons this Court should refuse to grant Defendants' Petition for Writ of Certiorari on the 42 U. S. C. §1981 ("§1981") issue are as follows:

1. This Court already has ruled on the issue whether the Title VII standards for liability are applicable to employment discrimination cases brought pursuant to §1981 in its decisions in Johnson v. Ry. Express Agency, Inc., 421 U. S. 454 (1975) and Washington v. Davis, 426 U. S. 229 (1976).

2. The Circuit Court ruling in the instant case is consistent with accepted principles of statutory construction.

3. There is no conflict among the circuits concerning the §1981 issue; indeed, all circuits which have addressed the issue are in accord with the ruling in the instant case.

4. A ruling by this Court on whether purposeful discrimination is required under 42 U. S. C. §1981 would not affect the outcome of this case because purposeful discrimination was proven, indeed admitted, at the trial below.

This Court should refuse to grant Defendants' Petition on the remedial hiring order issues for the following reasons:

1. The Circuit Court's decision on the appropriateness of the remedial hiring order herein is in accord with this Court's decision in International Brotherhood of Teamsters v. United States, 431 U. S. 324 (1977).

2. There is no conflict among the circuits concerning the remedial hiring order issues presented by Defendants' Petition.

3. The specific grounds Defendants raise for the proposition that the remedial hiring order was beyond the District Court's jurisdiction do not distinguish the instant case from those in which such relief has been upheld.

ARGUMENT

I

PURPOSEFUL DISCRIMINATION NEED NOT BE PROVED UNDER 42 U. S. C. §1981

Defendants have vigorously contended in their Petition for Writ of Certiorari that before a violation of 42 U. S. C. §1981 is made out,

plaintiff must show purposeful, i.e., willful or deliberate, discrimination based on race.

There is no merit to Defendants' assertions. Firstly, the contention by Defendants is contrary to this Court's prior holding in Washington v. Davis, the very decision upon which Defendants so heavily rely. Secondly, the Ninth Circuit's holding in the instant case is consistent with long-settled canons of statutory construction. And thirdly, contrary to Defendants' assertions, there is no conflict in the Circuits; in fact all Circuits which have addressed the point have made express rul ings which are consistent with the ruling of the Ninth Circuit in the instant case.

It also is the position of plaintiffs that even if purposeful discrimination is required to prove a violation of §1981, such a holding would not affect the outcome of the instant case.

A. THIS COURT ALREADY HAS HELD THAT PURPOSEFUL DISCRIMINATION IS NOT REQUIRED UNDER 42 U.S.C. §1981

Defendants' reliance upon Washington v. Davis for the proposition that purposeful discrimination must be proved under 42 U.S.C. §1981 is misplaced. This reliance is misplaced to the extent that the Washington v. Davis decision

contains a contrary holding. This is the case because a careful reading of the opinion in Washington v. Davis shows that: (a) the decision in Washington v. Davis that purposeful discrimination is necessary to make out a violation, found in Part "II" of the Washington v. Davis opinion, is strictly limited to cases based on the equal protection provisions of the Fifth and Fourteenth Amendments and does not extend to cases grounded on statutes; and (b) in Part "III" of the Washington v. Davis opinion, in which §1981 and a local District of Columbia statute are construed, the Court specifically interprets and construes §1981 and in doing so places the burden of proving "business necessity" upon employers sued under §1981 upon a mere statistical showing of adverse impact without a showing of purposeful discrimination.

A review of the procedural context in which Washington v. Davis reached the Court is helpful to a proper understanding of the opinion. In Part "I" of the Court's opinion, the procedural setting giving rise to the appeal is described at 426 U.S. 233-34 as follows:

> "These practices [including the written test] were asserted to violate respondents' rights 'under the due process clause of the Fifth Amendment to the United States Constitution, under 42 U.S.C. §1981 and under D.C. Code §1-320.' * * * Respondents then filed a motion for summary judgment with respect to the recuiting phase of the case, seeking a declaration

that the test administered to those applying to become police officers is 'unlawfully discriminatory and therefore is violation of the Due Process Clause of the Fifth Amendment. . . .' No issue under any statute or regulation was raised by the motion. The District of Columbia defendants, petitioners here, and the federal parties also filed motions for summary judgment with respect to the recruiting aspects of the case asserting that respondents were entitled to relief on neither constitutional nor statutory grounds." (Emphasis added; footnotes omitted.)

Part II of the Court's opinion is limited to a discussion of the issues involved in the respondent's motion which "rested on purely constitutional grounds. . . ." The Court premised its remarks in Part II by stating that "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standard applicable under Title VII, and we decline to do so today." After a long discussion of equal protection cases brought under the Fifth and Fourteenth Amendments and 42 U.S.C. §1983, the Court held that purposeful discrimination, rather than solely racially disaproportionate effect, must be shown to establish a claim under the constitutional equal protection provisions. The Court, therefore, concluded as follows:

"Because the Court of Appeals erroneously applied the legal standard applicable to Title VII cases in resolving

the constitutional issues before it, we reverse its judgment in respondents' favor." 426 U.S. at 238. (Emphasis added.)

* * *

"[I]t was error [for the Court of Appeals] to direct summary judgment for respondents based on the Fifth Amendment." 426 U.S. at 248.

In Part "III" of the Washington v. Davis decision, this Court then proceeded to discuss the issues involved in the petitioners' summary judgment motion that were not disposed of by its holding in Part "II." Thus, Part "III" deals exclusively with the issues concerning the statutory causes of action under §1981 and D.C. Code §1-320, the constitutional issues having been disposed of in Part "II." And, most importantly, in this Part "III" the Court applies the most basic principle of Title VII law, to wit: a mere statistical showing that an employment practice has an adverse impact upon a minority group shifts the burden to the employer to prove job-relatedness regardless of whether purposeful discrimination has been shown.

There can be no real question but that in Part "III" of the Washington v. Davis opinion, the Court was construing §1981 along with a District of Columbia local code section. The second paragraph of Part "III" of the opinion specifically notes that the defendant employer's motion for summary judgment (which is what was being discussed in Part "III") was based upon an

argument that the written test at issue "complied with all applicable statutory . . . requirements: and they appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied." (Emphasis added.) Since the Court in the first paragraph of Part "I" of the opinion specifically noted that the case was brought under §1981, and indeed in footnote two quoted §1981 in its entirety, and since the Court in Part "III" as quoted immediately above stated that it was construing "all applicable statutes" (plural, not singular), and since Title VII principles were applied by the Court in Part "III" of the Washington v. Davis opinion, it follows that this Court has adopted and applied Title VII principles while construing §1981. It is most noteworthy that the Title VII principle applied under §1981 in Part "III" of Washington v. Davis was the very principle at issue on this Petition -- whether in the absence of purposeful discrimination the burden to prove job-relatedness shifts to the employer upon a showing of statistical adverse impact.

The Ninth Circuit's holding that Title VII standards for liability apply in §1981 employment discrimination cases also is in accord with this this Court's decision in Johnson v. Railway Express Agency, Inc., 421 U. S. 454 (1975). Here this Court ruled at 421 U S. 459 that:

> "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrived individual clearly is not deprived of

> other remedies he possesses and is not limited to Title VII in his search for relief. '[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' Alexander v. Gardner-Denver Co. 415 U. S. at 48, 39 L. Ed. 2d 147, 94 S. Ct. 1011. In particular, Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U. S. C. §1981 [42 U. S. C. S. §1981], and that the two procedures augment each other and are not mutually exclusive.' H. R. Rep. No. 92-238, p. 19 (1971). See also S. Rep. No. 92-415, p. 24 (1971)." (Emphasis added.)

It is submitted that since the "remedies available" under Section 1981 are "co-extensive" with those under Title VII, it is inconceivable that the most basic standard for establishing liability under the two statutes, i.e., whether purposeful intent is required, would not be identical under both statutes. It is submitted that when this Court spoke of "remedies" in Johnson v. Railway Express, the Court was not speaking in the narrow sense of "relief," but rather in the broad sense of a "remedy for a wrong." When "remedy" is used in this latter

sense, and when it is stated that under the two statutes the "remedies" are "co-extensive," it follows that the standards for liability under the two statutes must be identical.

B. THE NINTH CIRCUIT'S §1981 RULING IS CONSISTENT WITH WELL ESTABLISHED PRINCIPALS OF STATUTORY CONSTRUCTION AND WITH 42 U.S.C. §1988

A central holding of this Court in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975) was stated as follows:

> "Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeals - and we now join them - that §1981 affords a federal remedy against discrimination in private employment on the basis of race."

Thus, this Court in Johnson at the least recognized that Title VII and §1981 provide overlapping statutory bases for employment discrimination actions.

The holding of the Ninth Circuit that these overlapping statutes should be construed consistently by incorporating Title VII standards into §1981 is compelled by long-established principals of statutory construction. Indeed,

more than a century ago this Court stated in United States v. Freeman, 3 How. 556, 564-65 (1845) that:

> "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts in pari materia are to be taken together, as if they were one law. (Doug., 30; 2 Term. Rep., 387,586; 4 Maule & Selw., 210.) If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute (Lord Raym., 1028); and if it can be gathered from a subsequent statute in pari materia, what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. (Morris v. Mellin, 6 Barn. & Cress., 454; 7 Barn. & Cress., 99.)" (Emphasis added.)

Similarly, in Cope v. Cope, 137 U.S. 682, 688-89 (1891), this Court provided that:

> "These several Acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several Acts were passed,

but the later Acts should also be regarded as legislative interpretations of the prior ones."

See also Tiger v. Western Investment Co., 221 U.S. 286 (1910).

The Fourth Circuit very recently has specifically applied the above reasoning while incorporating Title VII principles into §1981. Johnson v. Ryder Truck Lines, Inc., ___ F.2d ___ (4th Cir., May 2, 1978; No. 76-1293). Here the plaintiffs were contending that this Court's holding in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) was inapplicable on the theory that Teamsters applies only to Title VII cases. The Fourth Circuit ruled as follows at page eight of the slip opinion:

"Ordinarily, §1988 enables a district court to utilize Griggs's interpretation of Title VII in §1981 employment discrimination suits, but the court cannot transgress the limitation placed on the Griggs rationale in Teamsters with respect to §703(h). A ruling that a seniority system which is lawful under Title VII is nevertheless unlawful under §1981 would disregard the precepts of §1988."

The Fourth Circuit's reference to 42 U.S.C. §1988 is most noteworthy. That section, which in reality is a statutory codification of the

above-discussed long-established principle that statutes covering the same subject matter are to be construed consistently, reads as follows in applicable part:

"The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect. . . ."

In view of the above-stated principles of statutory construction, there is no validity to the arguments found at pages 11-13 of the Petition to the effect that the Ninth Circuit decision herein "has ramifications extending far beyond employment discrimination cases." (Petition p. 11.) This argument has no validity because under the principles of statutory construction outlined above and codified in 42 U.S.C. §1988, only that part of §1981 which also is covered by Title VII (i.e., employment contracts) would be affected by Title VII principles. Thus, unlike the situation in Washington v. Davis where basic and far-reaching Constitutional principles were being construed, in the instant case the fear does not exist that a whole range tax, welfare, and regulatory laws might be invalidated by the adoption of Title VII principles into §1981. In other words, to "conform" the two statutes as is required by §1988, all that need (or should) be done is incorporate the Griggs principle into §1981 employment discrimination cases, not into

other §1981 cases outside the employment sphere.

C. NO CIRCUIT HAS HELD THAT PURPOSEFUL DISCRIMINATION MUST BE PROVED IN EMPLOYMENT CASES BROUGHT UNDER SECTION 1981

None of the Circuit Court cases cited by Defendants at Section "III" of their Petition stand for the proposition, as claimed by Defendants, that purposeful and intentional discrimination must be proved in an employment case brought pursuant to 42 U.S.C. §1981. In the remainder of the instant section Plaintiffs will analyze each of the cases cited by Defendants, on a case by case basis, and show that none of the cases are in conflict with the Ninth Circuit holding herein.

The Tenth Circuit in Chicano Police Officer Assn. v. Stover, 552 F.2d 918 (10th Cir. 1977) responded to the order of the United States Supreme Court in Stover v. Chicano Police Officers Assn., 426 U.S. 944 (1976), that vacated and remanded the case, by reconsidering its prior holdings in light of Washington v. Davis, 426 U.S. 229 (1976). This lawsuit was brought pursuant to 42 U.S.C. §§1981, 1983 and 1985. In its opinion, however, the Circuit Court discusses only the effect of Washington v. Davis on the "constitutional violations" under §§1983 and 1985 and completely fails to address the impact on the §1981 statutory violations. Hence, this case cannot be considered a ruling contrary to the instant case on the §1981

issue raised by Defendants.

Similarly, the decision of the Seventh Circuit in United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977), cert. denied, ___ U.S. ___, 54 L.Ed.2d 155 (1978) did not include a ruling under §1981. Despite the fact that the case was brought pursuant to Title VII, the Fourteenth Amendment and §§1981, 1983 and 1985 by various plaintiffs, the Circuit Court at Section "III" of its opinion considers the merits of the case only as to the violations of Title VII (Section "III. B.") and equal protection clause (Section "III. C."). 549 F.2d 425. Contrary to the assertion of Defendants herein (Petition, page 19), the Circuit Court reversed only the district court's holding concerning violations of the equal protection clause and failed to consider the liability standard to be applied to the §1981 causes of action.

The other Seventh Circuit case cited by Defendants, City of Milwaukee v. Saxbe, 546 F.2d 693 (7th Cir. 1976), also is not on point. Although the Circuit Court did rule that the plaintiff's §1981 claim required a showing of intentional discrimination, the lawsuit did not involve a claim of employment discrimination. Rather, the city brought this action against the United States Attorney General alleging discriminatory enforcement of the civil rights laws. Hence, the Seventh Circuit has not ruled on the issue herein as to the standard for liability to be applied in a §1981 employment discrimination case.

The Eighth Circuit case Johnson v. Alexander, ___ F.2d ___, 16 FEP Cases 894 (8th Cir. 1978)

similarly is not in conflict with the Ninth Circuit's ruling herein. The holding in Johnson v. Alexander did not involve an employment contract. In fact, the Eighth Circuit categorically stated that had an employment case been before it, a contrary holding would have resulted, since at 16 FEP Cases 897-98 n. 3 is found the following statement:

> "The claim of the plaintiffs in Washington v. Davis was based solely on the fifth amendment; they did not invoke Title VII, and the Supreme Court recognized that the standards of Title VII may be broader than those of the amendment, invoked by plaintiffs 426 U.S. at 246-48. And, in a number of case it has been held that Title VII standards are applicable to suits brought by blacks under §1981." (Citations omitted; emphasis added.)

Plaintiffs further submit that a careful reading of the Eighth Circuit opinion in Johnson v. Alexander shows not only that that Court is in agreement with the holding of the Ninth Circuit herein, but also that the Eighth Circuit decision is premised entirely upon a finding that the case did not involve an employment situation.

Contrary to Defendants' contention at pages 17 and 18 of their Petition, the Sixth Circuit has not yet ruled on the §1981 issue. In Arnold v. Ballard, 16 FEP Cases 396, 12 EPD para. 11,224 (6th Cir. 1976) (not officially published), the Circuit Court merely vacated its previous decision and remanded the case to allow the district

court to consider initially the impact of Washington v. Davis on its findings. The district court has ruled on this issue but to date its decision has not been reviewed by the Sixth Circuit.

The Fifth Circuit in Harkless v. Sweeny Independent School District, 554 F.2d 1353 (5th Cir. 1977) was not presented with the issue of whether Title VII standards apply in §1981 actions. Nor did that court make any statements whatsoever concerning this issue. The facts of this case did not present a Griggs type violation requiring the adoption of Title VII standards in order to establish liability under §1981. Rather, the case involved a situation of blatant purposeful discrimination against black employees as compared to white employees and the Circuit Court held that the impact, historical background and sequence of events of the employer's actions established a case of intentional discrimination. Hence, the Fifth Circuit held only that a showing of purposeful discrimination was sufficient to establish a §1981 violation; there is no holding or implication that such a showing is required to establish a violation.

Defendants also cite the Fifth Circuit decision in Wade v. Mississippi Cooperative Extention Service, 528 F.2d 508 (5th Cir. 1976) as establishing the requirement that purposeful discrimination must be shown in §1981. The reality is that the holding in this case is precisely to the contrary. This case was filed in 1970 against a public employer challenging employment practices of the defendant as being in violation of the Fifth and Fourteenth Amendments, Title VI of the Civil Rights Act,

42 U.S.C. §§2000d, et seq. and 42 U.S.C. §§1981, 1983. Defendants no doubt rely on the Circuit Court's statement that it would not apply "Title VII guidelines" but rather that "public employment tests are to be judged under a constitutional standard in suits under 42 U.S.C. §§1981, 1983." 528 F.2d 518. In this statement, however, the Court is not discussing the prima facie case standard under §1981, but rather the burden on the defendant employer to show the job-relatedness of an employment practice already found to have an adverse impact. The Circuit Court held that the EEOC Guidelines were not the proper standard in a §1981 case. Defendants ignore the relevant holding of the Circuit Court at 528 F.2d 516-17 where it is stated: "It is, of course, beyond dispute that statistical evidence alone may enable the plaintiffs to satisfy their initial burden of showing discrimination."

D. ALL CIRCUITS WHICH HAVE ADDRESSED THE SECTION 1981 ISSUE ARE IN ACCORD

As pointed out in the immediately preceeding sub-section, none of the Circuit cases cited by Defendants stand for the proposition, as asserted, that purposeful discrimination must be proved under §1981. There are, however, two Circuit Courts in addition to the Ninth Circuit which have addressed the issue. Both expressly agree with the Ninth Circuit that purposeful discrimination need not be proved in an employment discrimination case brought pursuant to §1981.

The Circuit Court for the District of Columbia was the first Circuit to rule directly on the point. In Kinsey v. First Regional Securities, Inc., 557 F.2d 830 (D.C. Cir. 1977), it is held as follows at 557 F.2d 838 n.22:

> "In Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the court held that a racially disproportionate impact is a violation of equal protection, however, only where a discriminatory purpose is shown. Since plaintiff-appellant here proceeds under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq. and 42 U.S.C. §1981, he need not meet this burden of proof. See League v. City of Santa Ana, 13 FEP Cases 1019 (C.D. Calif. 1976) and The Supreme Court, 1975 Term, 90 Harv. L. Rev. 58, 114-23 (1976) for discussion of the Washington v. Davis decision."
> (Emphasis added.)

The Fourth Circuit also directly addressed the point in Johnson v. Ryder Truck Lines, Inc., ___ F.2d ___ (4th Cir., May 2, 1978; No. 76-1293). Here the Court expressly held that all of the usual Title VII standards apply in cases brought pursuant to §1981.

E. ASSUMING ARGUENDO THAT INTENTIONAL DISCRIMINATION MUST BE PROVED IN THIS CASE, THERE IS OVERWHELMING EVIDENCE, INCLUDING ADMISSIONS OF RACIALLY DISCRIMINATION PURPOSE, IN THE RECORD BELOW.

At finding of fact number seven the Court below found that "Neither Defendants nor their officials engaged in employment practices with a wilful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department." 8 FEP Cases 239,241. It is noteworthy that the Court below made this finding in the belief that purposeful discrimination was irrelevant to the proceeding; indeed, at conclusion of law number six, the Court below noted that the only intent showing required was that the defendants had intentionally utilized the employment practices found to be illegal. 8 FEP Cases 242.

A finding of fact made under Rule 52 is "clearly erroneous" when, although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

Before analyzing the facts below, it should be noted that in Washington v. Davis, supra, at 242, this Court stated:

> "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact -- in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires -- may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." (Emphasis added.)

Very recently this Court elaborated upon Washington v. Davis and provided further guidance as to the circumstances in which the requisite discriminatory purpose may be inferred. Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977). Here it was held:

> "Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislative or administrative body . . . made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. . . . When there is proof that a discriminatory purpose was a motivating factor in the decision . . .

judicial deference is no longer justified.

> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. 265-66. (Footnotes omitted; emphasis added.)

In the instant case, the required analysis of the "totality of the relevant facts" and the "circumstantial and direct evidence of intent" begins with the fact that it was stipulated below that: (a) although approximately 10.3% of the general population of Los Angeles County is black, at the time this lawsuit was commenced only nine persons in defendants' workforce of 1,762, or 0.5%, were blacks (R. 136); (b) although 18.3% of the general population of Los Angeles County is Mexican-American, at the time this lawsuit was commenced only 50 persons in defendants' workforce, or 2.8%, were Mexican-Americans (R. 136); and (c) immediately after this lawsuit was commenced, but only because this lawsuit was commenced, defendants altered their hiring practices and established an eligibility list on which no less than 98 of the top 315 persons on the list were black and Mexican-American (R. 141; R.T. 48-49). The dearth of minority employees on the payroll at the time the lawsuit was brought, coupled with the sudden ability to hire substantial numbers of minorities after being sued in a class action, creates an "inference," plaintiffs submit, that the supposedly racially

neutral employment practices utilized before commencement of this lawsuit were not utilized in good faith or with a lack of racial intent but rather that those practices were used with a racially discriminatory purposeful intent.

But this Court need not rely on statistical and logical inferences in determining whether the Defendants engaged in purposeful or intentional discrimination prior to commencement of this action. Indeed, the evidence of purposeful discrimination below was so strong that "intentional" discrimination was admitted by Chief Barlow himself, the Chief of the Los Angeles Fire Department (R.T. 187-88).

Similarly conclusive evidence of blatant intentional or purposeful discrimination was found in the testimony of Harold McCann, a captain in the Los Angeles County Fire Department. He testified as to how programs designed to assist applicants were conducted exclusively for whites while similar programs with minority participants were prohibited by the Fire Department (R.T. 91-113).

Perhaps the most devastating evidence in the record below of intentional discrimination concerns the conceded fact that high officials in Defendants' personnel department admittedly knew that the written tests being utilized as part of the selection system for new firefighters operated to exclude blacks and Mexican-Americans, knew that these tests violated well-established Title VII legal principles, and nevertheless these

officials admittedly continued to utilize these tests as part of the selection process until they learned that this class action lawsuit was about to be commenced. The evidence below showing these facts is found at Plaintiffs' Exhibits seven, eight and nine, and at R.T. 48-49.

II

THE ISSUANCE OF THE REMEDIAL HIRING ORDER HEREIN WAS WITHIN THE JURISDICTION OF THE DISTRICT COURT

The second question presented by Defendants' Petition is whether the District Court exceeded its jurisdiction when it issued an affirmative action hiring order to remain in effect until such time as the percentage of minorities employed in the Los Angeles County Fire Department approximately equals the percentage of minorities in the general population of Los Angeles County. The District Court held that this prospective hiring order was "necessary to overcome the presently existing effects of past discrimination" as evidenced by the unrebutted prima facie case established by the severe under-utilization of minorities in Defendants' workforce. See Opinion below at 8 FEP Cases 239, 241-42.

In International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), this Court has recognized that a remedial hiring order,

virtually identical to the order herein, is appropriate relief where the plaintiffs have shown the existence of a pattern and practice of discrimination. At Section "III. A." of the Teamsters decision, 431 U.S. 361, this Court described the nature of appropriate "prospective relief" including at footnote 47 the injunctive relief afforded in that case, which at 431 U.S. 330-31 n. 4 was described as follows:

> "The decree further provided that future job vacancies at any T.I.M.E.-D.C. terminal would be filled first '[b]y those persons who may be found by the court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964.' Any remaining vacancies could be filled by 'any other persons,' but the company obliged itself to hire one Negro or Spanish-surnamed person for every white person hired at any terminal until the percentage of minority workers at that terminal equalled the percentage of minority group members in the population of the metropolitan area surrounding the terminal."

Furthermore, as stated by the Ninth Circuit in its decision on rehearing in the instant case, "[e]ight Courts of Appeal, including this one, have considered and approved the use of accelerated hiring goals or quotas to eradicate

the effects of past discrimination." (Citations omitted.) 566 F.2d 1342. Hence, Defendants' Petition raised an issue that uniformly has been resolved by this Court and the Courts of Appeal in favor of the availability of prospective injunctive hiring relief.

The specific grounds for review set forth by Defendants do not distinguish the instant case from those in which remedial prospective hiring orders previously have been upheld. Defendants list three grounds as limiting the District Court's jurisdiction to order prospective relief herein: (1) the absence of a finding of intentional discrimination; (2) the fact that the discriminatory acts causing the present workforce/labor pool disparity took place prior to the effective date of Title VII and the applicable statute of limitations for §1981; and (3) a lack of standing due to the fact that the plaintiff class did not include past applicants who were affected by the past unlawful practices. (Petition, pages 2-3.)

A. A FINDING OF INTENTIONAL DISCRIMINATION IS NOT REQUIRED FOR A HIRING ORDER UNDER §1981

Defendants' first argument raises in a different context the previously-discussed issue as to the proper standard for liability for violations based upon §1981. Defendants argue: (1) the acts causing the under utilization of minorities occurred before the date Title VII

became applicable to public employers; (2) hence, the entitlement to relief from the effects of these act must be based on violations of §1981; (3) a violation of §1981 requires a showing of intentional discrimination; (4) the District Court found no discriminatory intent; and (5) therefore, the pre-Title VII acts were not unlawful and Plaintiffs are not entitled to relief from their present effects.

Plaintiffs agree that the remedial hiring order herein was based upon a pattern and practice of discriminatory practices that were unlawful only under §1981, not Title VII. As discussed previously in this brief, however, §1981 does not require a showing of intentional discrimination (Section "I" above) and that even if it does, the District Court's gratuitous finding of no discriminatory intent is contrary to the facts in the Record and should be remanded (Section "I. E.").

B. THE EXTENT OF A REMEDIAL HIRING ORDER IS NOT LIMITED BY THE STATUTE OF LIMITATIONS

Defendants' second contention is that the remedial hiring order exceeds the District Court's jurisdiction because it provides relief for the present effects of hiring practices that occurred prior to the three year statute of limitation period applicable to §1981 actions. Defendants, however, do not come forward with any cases in which a prospective hiring order has been so limited. Indeed, in cases too numerous to cite, the Courts

have both explicitly and implicitly held that the statute of limitations does not affect the extent of prospective hiring relief. See e.g., the cases cited in the opinion below in the instant case at 566 F.2d 1342-43.

The basis for three rulings is the settled legal principle that when a "public right" is being enforced, the statute of limitations does not restrict the injunctive, non-monetary relief to be afforded. There is no conflict among the Circuits in employment discrimination cases that have ruled directly on this point. EEOC v. Occidental Life Insurance Co., 535 F.2d 533, 537-40 (9th Cir. 1976) aff'd on other grounds, 432 U.S. 355 (1977); EEOC v. Griffin Wheel, 511 F.2d 456, 458-59 (5th Cir. 1975); EEOC v. Kimberly Clark Corp., 511 F.2d 1352, 1359-60 (6th Cir. 1975). See also, EEOC v. Christiansburg Garment Co., Inc., 376 F. Supp. 1067, 1071-73 (W.D. Va. 1974); EEOC v. Duff Bros., Inc., 364 F. Supp. 405, 406-7 (E.D. Tenn. 1973); EEOC v. Eagle Iron Works, 367 F. Supp. 817, 823-24 (S.D. Iowa 1973); EEOC v. Laacke & Joys Co., 375 F. Supp. 852, 853 (E.D. Wis. 1974); EEOC v. Bell Helicopter Co., 426 F. Supp. 785, 790 (N.D. Tex. 1976). These cases explicitly distinguish between the "public rights" embodied in a prospective hiring order and the "private or individual rights" to backpay and retroactive seniority.

C. PLAINTIFFS HAVE STANDING TO SEEK A PROSPECTIVE HIRING ORDER RELIEF

Defendants' final ground for opposing the remedial hiring order is that the Plaintiffs lack standing to seek such an order, arguing that the individual named plaintiffs do not have standing to challenge the past hiring practices which caused the severe under-representation of minorities in the Defendants' workforce. Defendants base their argument on the Circuit Court's ruling that Plaintiff did not have standing to challenge a 1969 written test because the 'plaintiffs' class did not include any prior unsuccessful applicants." 566 F.2d 1337-38.

The failure to include past applicants in the plaintiff class is not a fatal defect depriving the District Court jurisdiction to awarding prospective hiring relief. In this regard, it is to be noted that: (1) the plaintiff class was defined by the Court below in terms of those persons entitled to injunctive relief as a result of Defendants' discriminatory hiring practices; (2) the named plaintiffs, who included current employees of the Los Angeles County Fire Department, had standing to seek a prospective hiring order; and (3) even if Plaintiffs do not currently have standing, on remand Plaintiffs should be allowed to remedy the mutual mistake of the Court and the parties by seeking a redefinition of the class to include past applicants.

Plaintiffs' first point is that it is irrelevant that the scope of the represented class as defined below did not include past applicants. In this lawsuit, the only relief sought by the Plaintiffs has been and is a hiring order designed to eliminate the effects of past discrimination. Plaintiffs did not seek individual back pay or seniority relief for identifiable past applicants. Hiring order relief, by its very nature, only can be prospective in nature. It was solely because the Plaintiffs sought prospective relief only, and not because the Plaintiffs did not challenge past practices affecting prior applicants, that the class certified below did not include past applicants. In other words, the parties and the court below, when they defined class, were focusing on the prospective relief sought by the Plaintiffs and therefore defined the class in terms of those entitled to relief. In this vein, it should be noted that the past applicants can and will benefit from the prospective relief at such time as they re-apply and thereby become future applicants.

In the alternative, three of the individual plaintiffs were and are minorities employed as firefighters by the County of Los Angeles. Three Circuit Courts have held that current employees of a defendant employer have standing as persons who are harmed by the under-representation of minorities in the workforce. Waters v. Heublein, Inc., 547 F.2d 466, 469-70 (9th Cir. 1976); Chicano Police Officer Assn. v. Stover, 526 F.2d 431, 435-37 (10th Cir. 1975); Gray v. Greyhound Lines, East, 545 F.2d 169, 175-76 (D.C. Cir. 1976)). Obviously, effective relief for the harm suffered by current employees

can be provided only by a prospective hiring order.

Finally, Plaintiffs' conduct of this case has consistently focused on Defendants' past hiring practices. The statement of the liability issue before the court below specifically goes to all employment practices, past and present. (R. 134.) The evidence below reflected this broadly stated liability issue. For example, in the Pre-Trial Conference Order, the overwhelming majority of stipulations of fact (R. 136-141) and "statements of material facts and relevant law" (R. 142-148) related to Defendants' past pattern and practice of discrimination in their hiring practices. Furthermore, the District Court's Finding of Facts and Conclusions of Law discusses and rules on the legality of Defendants' past hiring practices and specifically finds that the hiring order is "necessary to overcome the presently existing effects of past discrimination." 8 FEP Cases 239,241-42. Hence, this is not a case where the Plaintiffs have failed to challenge past employment practices.

Plaintiffs submit that if past applicants must be included in the plaintiff class in order for a prospective hiring order to be granted, the mutual mistake of the parties and the District Court that resulted in the failure to include past applicants in the class should not be fatal to the hiring order herein. Rather, this Court should either remand this case to the District Court for reconsideration

of the class definition or redefine the class on its own motion based on the facts in the Record.

III

CONCLUSION

For the reasons stated above, Plaintiffs respectfully submit that Defendants' Petition for Writ of Certiorari should be denied.

Dated: May 26, 1978.

Respectfully submitted,

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